ful subjects of taxation for state purposes in said county a sum and tax sufficient to pay the interest on said bonds, and in such manner as they may deem best create a sinking fund sufficient to pay the said bonds at or before maturity."

We are of opinion that upon none of the grounds relied on by petitioners in this case should the writ of prohibition prayed be awarded, and it is therefore denied.

Writ denied.

SAUNDERS *et al. v.* SAUNDERS' ADM'RS.

Jan. 14, 1909.

[63 S. E. 410.]

1. Wills (§ 523*)—Construction.—Whether a devise or bequest is to a class or to the individual constituting the class distributively is a question of intention, depending on the language of the testator in making the gift.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1115; Dec. Dig. § 523.*]

2. Wills (§ 547*)—Class Gift.—Where the gift is to a class, and it fails as to one of the class because of death, revocation, or any other cause, the survivors of the class will take.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 547.*]

3. Wills (§ 523*)—Construction.—Testator left his entire estate to his wife for life, providing that at her death, it should be divided between the children of his brother and testator's ward. If any of the children died leaving issue, such issue were to take the share of their deceased parent, and, if the ward died without issue, the entire estate was to go to the brother's children. By a codicil testator revoked the provision for the ward. Held, that the disposition of the remainder was a class gift, and that the effect of the codicil was to take the ward out of the class, and to leave the entire residuum to the children of the brother and to the issue of any deceased child.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1115; Dec. Dig. § 523.*]

Appeal from Circuit Court, Culpeper County.

Suit by George L. Browning and another, administrators of the estate of C. A. Saunders, against Lucy R. Saunders and others to construe a will. From the decree, defendants appeal. Affirmed.

---

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

Grimsley & Miller and *C. F. Harley,* for appellants.

Waite & Perry, Rixey & Hiden and *John S. Barbour, Jr.,* for appellees.

BUCHANAN, J. On the 21st of January, 1885, C. A. Saunders made his last will and testament, which contains the following provision:

"I give, devise and bequeath all of my property of every description and wherever located to my wife, Lucy R. Saunders, for and during her natural life, and at her death to be divided between the childen of my brother Richard Saunders, of Dunnville, Essex County, Virginia, and my ward, Miss Eva Byrd Hill, to share and share alike, and in the event of the death of any of the children of my brother leaving issue, then such issue to take the share of their deceased parent, and in the event of the death of my ward, Miss Eva Byrd Hill, without issue, the entire estate to go to my brother's children."

By a codicil made June 6, 1890, he revoked the provision for the benefit of his ward.

Richard Saunders, the brother of the testator, died in the year 1888, leaving five children, all of whom were in being at the date of the will, but one of them died before the testator leaving issue.

The contention of the appellants is that the share of the testator's estate which would have gone to his ward, Eva Byrd Hill, but for the codicil revoking the provision for her benefit, lapsed and passed under the statute of descents to the heirs and next of kin of the testator. The appellees, on the other hand, insist that the residuary estate of the testator was given to the children of Richard Saunders and Eva Byrd Hill as a class, and that, upon the revocation of the provision in favor of Miss Hill, the share which would otherwise have gone to her did not lapse, but passed to the other members of the class. In other words, the controversy between the parties is whether the gift to the children of Richard Saunders and Miss Hill was a gift to a class or distributively to them as individuals.

Whether a devise or bequest is to a class or to the individuals constituting the class distributively is a question of intention, depending upon the language of the testator in making the gift. All the provisions of the will may be considered, and sometimes aid may be had from the relation and situation of the parties.

In this case there is nothing outside of the clause quoted which throws much, if any, light upon the question. Miss Hill, the ward of the testator, was an orphan, a grandniece of his wife, and had been reared as a member of his family since the death of her parents, which occurred within six months after her birth. It is clear from the testator's original will that he intended to dis-

pose of his entire estate. He gives the whole of it for life to his wife, and then it is to be equally divided between his ward, Miss Hill, and the children of his brother, Richard, share and share alike. This disposition of the remainder was a class gift under the authorities.

Mr. Jarman on Wills (5th Ed. Bigelo,) 269, defines what constitutes a gift to a class as follows. "A number of persons are popularly said to form a class when they can be designated by some general name, as 'children,' 'grandchildren,' 'nephews,' but in legal language the question whether a gift is to a class depends not upon these considerations but upon the mode of the gift, namely, that it is a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, and who are to take in equal or in some other definite proportion; the share of each being dependent for its amount upon the ultimate number of persons."

"In legal contemplation," says Page on Wills (Ed. 1901) § 540, "a gift to a class is an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, who are to take in equal or some other definite proportions; the share of each being dependent for its amount upon the ultimate number."

Mr. Jarman gives as an illustration of what will constitute a gift to a legal class, as distinguished from what is popularly said to form a class, the following: "A gift to A., B., and C. and the children of D., share and share alike, is, legally speaking, a gift to a class, but those persons would not in the ordinary acceptation of the term form a class." Volume 1, p. 269 See, also, Porter *v.* Fox, 6 Simmons, Chy. 485; Knapping *v.* Tomlinson, 34 L. J. N. S. 3; Re Stanhope's Trusts, 27 Beavan, 203.

In the case of Pendleton *v.* Hoomes, Wythe 94, the residuum of the testator's estate was disposed of as follows: "I give all the residuum of my estate to be equally divided between the children of my uncle, Benjamin Hoomes, and my nephew, John Hoomes, and their heirs forever, share and share alike." Between the date of the will and the death of the testator one of Benjamin Hoomes' children died. John Hoomes claimed that the share of the deceased lapsed and passed to him as the heir at law of the testator, but Chancellor Wythe held that it did not lapse, but that the surviving legatees or their assignees shared as if the deceased child had never existed, thus holding in effect, if not in words, that the gift was to the testator's nephew and the children of his uncle as a class.

The language of the gift of the residuum in that case is substantially the same as the gift of the remainder in this, except

that in this case there is a provision that, if any of the children of the brother die leaving issue, such issue shall take the deceased parent's share, and, if his ward die without issue, the entire estate is to go to his brother's children. There is nothing in that language which shows that the testator did not intend his gift to be to a class, or which furnishes any sufficient reason for holding that it was not such a gift.

Where the gift is to a class and it fails as to one of the class because of death, revocation, or any other cause, the survivors of the class will take. 1 Jarman on Wills (5th Ed.) 341; Humphrey *v.* Taylor, Ambler's Rep. 136; Short *v.* Gashell, 4 East. 419.

The effect of the revocation of the gift to his ward by the codicil to the testator's will was therefore to take her out of the class and leaves the entire residuum to go to the children of the testator's brother who survived the testator and the issue of the deceased child.

We are of opinion, therefore, that there is no error in the decree appealed from, and that it should be affirmed.

Affirmed.

DIGEST OF OTHER RECENT VIRGINIA DECISIONS.

Supreme Court of Appeals.

Note.—In this department we give the syllabus of every case decided by the Virginia Supreme Court of Appeals, except of such cases as are reported in full.

AULTMAN & TAYLOR MACHINERY CO. *v.* GAY.

Nov. 19, 1908.

[62 S. E. 946.]

1. Sales (§ 161*)—Performance—Delivery.—F., acting as agent for defendant, sold an engine to the T. Company at H., and the engine was consigned by defendant to itself, care of F. at H., pursuant to an order contained in a printed form furnished by defendant to be signed by the purchaser. On arrival, the engine was put together on the car by F., assisted by another person employed by him. The printed order specified no particular place for delivery, but stipulated that the engine was shipped as the property of defendant. Held, that the act of F. and his assistant in setting up the engine and in removing

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.